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16 Attorneys for Plaintiff the People of the State of California *ex rel.* California State Water
Resources Control Board and California Regional Water Quality Control Board, San
17 Francisco Bay Region

18 IN THE UNITED STATES DISTRICT COURT
19 FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

20 UNITED STATES OF AMERICA, and)
THE PEOPLE OF THE STATE OF)
21 CALIFORNIA *ex rel.* CALIFORNIA)
STATE WATER RESOURCES)
22 CONTROL BOARD, and CALIFORNIA)
REGIONAL WATER QUALITY)
23 CONTROL BOARD, SAN FRANCISCO)
BAY REGION,)

24 Plaintiffs,
25 v.

26 EAST BAY MUNICIPAL UTILITY
27 DISTRICT

28 Defendant.

COMPLAINT

ORIGINAL
FILED

JAN 15 2009

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA

E-filing

MEJ

CV 09

0186

CASE NO.

COMPLAINT

1 Plaintiff, the United States of America ("United States"), through its undersigned
2 attorneys, by the authority of the Attorney General of the United States and at the request of the
3 Administrator of the United States Environmental Protection Agency ("EPA"), and Plaintiff the
4 People of the State of California *ex rel.* California State Water Resources Control Board and
5 California Regional Water Quality Control Board, San Francisco Bay Region (the "State")
6 through its undersigned counsel, are filing a Complaint to enforce federal and state law, and
7 allege as follows:

8 NATURE OF ACTION

9 1. This is a civil action brought pursuant to Section 309 of the Clean Water Act
10 ("CWA" or the "Act"), 33 U.S.C. § 1319, and California Water Code Sections 13376, 13385, and
11 13386 against East Bay Municipal Utility District ("EBMUD"). EBMUD discharged sanitary
12 sewage from its publicly owned treatment works, including certain wet weather facilities, in
13 violation of the terms of its National Pollutant Discharge Elimination System ("NPDES") permit
14 issued pursuant to CWA Section 402, 33 U.S.C. § 1342, and California Water Code Section
15 13377. EBMUD also discharged sanitary sewage from its sanitary sewage collection system
16 without an NPDES permit. These actions violated CWA Section 301(a), 33 U.S.C. § 1311(a),
17 and California Water Code Section 13376.

18 2. Plaintiffs United States and the State bring this action to enjoin the violations of
19 the CWA and violations of NPDES permit requirements, and to require the payment of
20 appropriate civil penalties by EBMUD pursuant to CWA Section 309(d), 33 U.S.C. § 1319(d),
21 and California Water Code Sections 13385 and 13386.

22 JURISDICTION, VENUE AND NOTICE

23 2. This Court has jurisdiction over the subject matter of this action pursuant to
24 Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1331, 1345, 1355 and 1367.

25 3. Venue is proper in this judicial district pursuant to Section 309(b) of the CWA, 33
26 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391 and 1395 and California Water Code Section 13361.

27 4. Intradistrict assignment is proper in the Oakland Division pursuant to Civil L.R.
28 3-2 because the events and omissions giving rise to this Complaint occurred in Alameda and

1 Contra Costa Counties and EBMUD's system is located in Alameda and Contra Costa Counties.

2 5. EPA has provided notice of the commencement of this action to the State of
3 California pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b). The State has been
4 joined as a co-plaintiff and has filed this action in accordance with Section 309(e) of the Act, 33
5 U.S.C. § 1319(e).

6 PARTIES

7 6. Plaintiff United States is acting at the request of and on behalf of the
8 Administrator of EPA ("Administrator"). The Attorney General is authorized to appear and
9 represent the United States in this action pursuant to CWA Section 506, 33 U.S.C. § 1366, and
10 28 U.S.C. §§ 516 and 519.

11 7. Plaintiff the People of the State of California is acting on behalf of State Water
12 Resources Control Board ("State Water Board") and the California Regional Water Quality
13 Control Board, San Francisco Bay Region ("Regional Water Board"), who are the state agencies
14 with primary responsibility for water quality control. California Water Code Section 13001. The
15 State Water Board and Regional Water Board implement an EPA-approved NPDES program that
16 complies with the CWA and its regulations. California Water Code Sections 13370, 13372,
17 13377. The State Water Board and the Regional Water Board are political subdivisions of the
18 State, and are "persons" as that term is defined in CWA Section 502(5), 33 U.S.C. § 1362(5).

19 8. Defendant EBMUD is a political subdivision of the State of California. It is a
20 special services district created to provide drinking water and sanitary sewerage services to
21 communities in portions of Alameda and Contra Costa Counties on the eastern edge of San
22 Francisco Bay. EBMUD is a "municipality" within the meaning of Section 502(4) of the CWA,
23 33 U.S.C. § 1362(4), and is also a "person" within the meaning of Section 502(5) of the CWA,
24 33 U.S.C. § 1362(5), and California Water Code Section 13050(c).

25 9. Defendant EBMUD is a district of limited powers and a public agency of the State
26 of California and has the power to sue and be sued. California Government Code Sections
27 56037, 56070.

FEDERAL STATUTORY AND REGULATORY BACKGROUND

10. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person except as authorized by and in compliance with certain other sections of the Act, including Section 402 of the CWA, 33 U.S.C. § 1342.

11. Section 502(12) defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source" or "any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1362(12).

12. Section 502(7) of the CWA defines navigable waters "to be the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

13. Section 502(6) of the Act defines "pollutant" to include sewage. 33 U.S.C. § 1362(6).

14. Section 502(5) of the Act defines "person" to include a "State, municipality, commission, or political subdivision of a State." 33 U.S.C. § 1362(5). Section 502(4) of the CWA defines "municipality" to include an "association or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage." 33 U.S.C. § 1362(4).

15. EPA regulations promulgated pursuant to the CWA define the term "waters of the United States" to include, inter alia, (i) all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (ii) all interstate waters; (iii) all other waters such as intrastate lakes, rivers and streams, including intermittent streams, the use, degradation or destruction of which would or could affect interstate or foreign commerce; (iv) tributaries of waters of the United States; (v) the territorial seas; and (vi) certain wetlands (or wetlands adjacent to these waters). 40 C.F.R. § 122.2.

16. Section 502(14) of the Act defines the term "point source" to include "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel conduit, well . . . [or] container . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

1 17. Pursuant to Section 402(a) of the CWA, 33 U.S.C. § 1342(a), the Administrator of
2 EPA may issue NPDES permits which authorize the discharge of pollutants into waters of the
3 United States, subject to the conditions and limitations set forth in such permits.

4 18. Under Section 402(b) of the CWA, 33 U.S.C. § 1342(b), the EPA Administrator
5 may approve a proposal submitted by a state to administer the NPDES program in that state. The
6 Administrator approved California's proposal to administer the NPDES permit program in
7 California in 1973. At all times relevant to this action, the Regional Water Board has been
8 authorized to issue NPDES permits in conformity with federal law.

9 19. EPA retains concurrent enforcement authority pursuant to Section 402(i) of the
10 Act, 33 U.S.C. § 1342(i).

11 20. Section 309(b) of the Act, 33 U.S.C. § 1319(b), authorizes EPA to commence a civil
12 action for appropriate relief, including a permanent or temporary injunction, against any person
13 who violates Section 301(a) of the CWA.

14 21. Pursuant to Section 309(d) of the Act, 33 U.S.C. § 1319(d), and 40 C.F.R. § 19.4,
15 any person who violates Section 301(a) of the Act, 33 U.S.C. § 1311(a), shall be subject to civil
16 penalties not to exceed \$32,500 for each violation occurring after March 15, 2004. See also 62
17 Fed. Reg. 7121-01 (Feb. 13, 2004) (codified at 40 C.F.R. pt. 19).

18 STATE STATUTORY AND REGULATORY BACKGROUND

19 22. California Water Code Section 13376 prohibits the discharge of pollutants or the
20 operation of a publicly owned treatment works by any person except as authorized by Waste
21 Discharge Requirements. Waste Discharge Requirements are equivalent to NPDES permits.
22 Cal. Water Code § 13374. Pursuant to California Water Code section 13373, the terms
23 "navigable waters," "pollutants," and "discharge" have the same meaning as in the CWA for
24 state programs implementing the CWA. A "person" is defined by California Water Code Section
25 13050(c) to include, inter alia, any district such as EBMUD. Additionally, EBMUD is a person
26 under Section 502(5) of the Act and the provisions of the Water Code implementing the Act
27 must be construed to ensure consistency with the Act. Cal. Water Code § 13372.

28 23. Under California Water Code Section 13361, the California Attorney General is

1 authorized to bring a civil action at the request of the Regional Water Board and the State Water
2 Board enforcing the provisions of division seven of the California Water Code (known as the
3 Porter-Cologne Water Quality Control Act). Any actions relating to the same discharge may be
4 joined or consolidated. Cal. Water Code § 13361(a).

5 24. California Water Code Section 13385(m) provides that, upon request of the
6 Regional Water Board, the California Attorney General shall petition the appropriate court to
7 collect civil penalties appropriate under that Section. Remedies under California Water Code
8 Section 13385 are expressly cumulative to, and do not supersede, any other remedies (with
9 exceptions not applicable here). Cal. Water Code § 13385(g). Pursuant to California Water Code
10 Section 13386, the California Attorney General, at the request of the Regional Water Board or
11 the State Water Board, is authorized to petition the appropriate court for an injunction restraining
12 the violation of the requirements of paragraphs (1) through (6) of California Water Code Section
13 13385, subdivision (a) (including violation of a Waste Discharge Requirement permit).

14 GENERAL ALLEGATIONS

15 25. Defendant EBMUD owns and operates a publicly-owned treatment works ("the
16 POTW") as defined in Section 212 of the Act, 33 U.S.C. § 1292, and 40 C.F.R. § 403.3(o). The
17 POTW treats and disposes of sanitary sewage for seven satellite systems ("Satellites"): the cities
18 of Alameda, Albany, Berkeley, Emeryville, Oakland and Piedmont; and the Stege Sanitary
19 District. The POTW serves a population of approximately 650,000 people and provides for the
20 treatment and disposal of wastewater generated by commercial and industrial facilities in the
21 service area of the Satellites. Total sewage flow treated in EBMUD's POTW averages 79.6
22 million gallons per day ("MGD").

23 26. EBMUD has a treatment plant in Oakland. On June 20, 2001, the Regional Water
24 Board issued NPDES permit No. CA0037702 to EBMUD ("treatment plant permit"). The
25 permit authorizes EBMUD to discharge treated sanitary sewage from EBMUD's treatment plant
26 through a submerged diffuser into the central San Francisco Bay ("outfall"). The outfall is a
27 "point source" within the meaning of Section 502(14) of the Clean Water Act, 33 U.S.C. §
28 1362(14). This permit expired on May 31, 2006, but has been administratively extended and

1 thus remains in force.

2 27. EBMUD also operates three wet weather facilities (“WWFs”) – Point Isabel
3 WWF, Oakport WWF, and San Antonio Creek WWF – that, during wet weather, treat and
4 discharge sanitary sewage flows that cannot be handled by EBMUD’s interceptors and treatment
5 plant. Several times a year, EBMUD discharges partially treated sewage from these WWFs into
6 the San Francisco Bay. On September 21, 2005, the Regional Water Board issued NPDES
7 permit No. CA0038440 to EBMUD (“WWF permit”).

8 28. The treatment plant permit does not authorize EBMUD to discharge untreated or
9 partially treated sewage from its treatment plant, its collection system or pump stations tributary
10 to the treatment plant. Standard Provision A.8 incorporated by reference into the treatment plant
11 permit requires EBMUD to operate its collection system in a manner that precludes public
12 contact with wastewater. The permit further authorizes only the discharge of treated sanitary
13 sewage from the outfall that meets certain effluent limitations setting forth maximum permissible
14 pollutant concentrations for several different pollutant parameters, including but not limited to,
15 total suspended solids (“TSS”).

16 29. The WWF permit authorizes only the discharge of partially treated sanitary
17 sewage that meets certain effluent limitations setting forth maximum permissible pollutant
18 concentrations for several different pollutant parameters, including but not limited to, Chlorine
19 residual and various metals, including silver.

20 30. On May 1, 2007, the State Water Board ordered that the next NPDES permit
21 issued to EBMUD require that all discharges from the WWFs comply with effluent limitations
22 that assure compliance with secondary treatment standards and water quality standards. At
23 present, EBMUD is not able to comply with this new requirement. A proposed new permit was
24 issued by the Regional Water Board on November 14, 2008. This permit has not been finalized.

25 31. On three occasions (as set forth in Appendix A) from on or about December 18,
26 2005 through the present, EBMUD, as a result of sewage spills from its collection system,
27 discharged sanitary sewage directly or indirectly into waters of the United States.

28 32. On October 11, 2007, a sewage spill from the EBMUD collection system reached

1 the ground and therefore created the potential for public contact with untreated wastewater.

2 33. Untreated sewage contains organic matter, bacteria and other potential pathogens,
3 all of which are harmful to the environment, including marine life. Similarly, the pathogens
4 released from raw sewage create a potential public health risk if humans come into contact with
5 the sewage.

6 34. On several occasions (as set forth in Appendix A) from December 21, 2005 to the
7 present, EBMUD discharged partially treated sanitary sewage from the WWFs that did not meet
8 the effluent limitations in the WWF permit.

9 35. On several occasions (as set forth in Appendix A) from November 25, 2006 to the
10 present, EBMUD discharged treated sanitary sewage from its wastewater treatment plant that did
11 not meet the effluent limitations in the treatment plant permit.

12 FIRST CLAIM FOR RELIEF
13 (Collection System Overflows)

14 36. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1-35
15 inclusive as if set forth in full herein.

16 37. The manholes, sewer lines, and various other confined discrete conveyances
17 associated with the POTW from which EBMUD spilled sewage are point sources within the
18 meaning of the CWA. 33 U.S.C. § 1362(14).

19 38. The various waters into which EBMUD spilled sewage are waters of the United
20 States within the meaning of EPA regulations and Section 502(7) of the Act and hence are
21 navigable waters within the meaning Section 502(7) of the Act. 33 U.S.C. § 1362(7).

22 39. By spilling or discharging sewage from the POTW collection system to waters of
23 the United States and waters of the State on several days since on or about December 18, 2005 as
24 described in paragraph 31 above, EBMUD has on each of these days violated Section 301(a), 33
25 U.S.C. § 1311(a) and California Water Code Section 13376, by discharging pollutants without
26 obtaining a permit in accordance with CWA Section 402, 33 U.S.C. § 1342, or California Water
27 Code Section 13377.

28 40. By spilling untreated sewage from its collection system on October 11, 2007,

1 EBMUD violated Section 301(a), 33 U.S.C. § 1311(a) and California Water Code Section
2 13376, by discharging pollutants in violation of the terms of an NPDES permit issued pursuant to
3 33 U.S.C. § 1342.

4 41. Unless enjoined by an order of the Court, EBMUD will continue to violate the
5 Act and California Water Code Section 13376.

6 SECOND CLAIM FOR RELIEF
7 (WWF Effluent Limit Violations)

8 42. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1-35
9 inclusive as if set forth in full herein.

10 43. By discharging partially treated sewage from the WWFs in violation of effluent
11 limits on several days since on or about December 21, 2005 as described in paragraph 34 above,
12 EBMUD has on each of these days violated Section 301(a), 33 U.S.C. § 1311(a) and California
13 Water Code Section 13376, by discharging pollutants in violation of the terms of an NPDES
14 permit issued pursuant to 33 U.S.C. § 1342.

15 44. Unless enjoined by an order of the Court, EBMUD will continue to violate the
16 Act and California Water Code Section 13376.

17 THIRD CLAIM FOR RELIEF
18 (Treatment Plant Effluent Limit Violations)

19 45. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1-35
20 inclusive as if set forth in full herein.

21 46. By discharging treated sewage from the treatment plant in violation of effluent
22 limits on several days since on or about November 25, 2006 as described in paragraph 35 above,
23 EBMUD has on each of these days violated Section 301(a), 33 U.S.C. § 1311(a) and California
24 Water Code Section 13376, by discharging pollutants in violation of the terms of an NPDES
25 permit issued pursuant to 33 U.S.C. § 1342.

26 47. Unless enjoined by an order of the Court, EBMUD will continue to violate the
27 Act and California Water Code Section 13376.

28 PRAYER FOR RELIEF

WHEREFORE, the United States of America and the State of California respectfully

1 request that the Court:

2 1. Permanently enjoin EBMUD from operating its POTW, including its collection
3 system and WWFs, in violation of the Clean Water Act and of the California Water Code;

4 2. Assess civil penalties against EBMUD in favor of the United States of America in an
5 amount not to exceed \$32,500 per day for the violations alleged except the December 18, 2005
6 spill;

7 3. Assess civil liabilities against EBMUD in favor of the State of California for
8 violations as appropriate under California Water Code Section 13385 except for the December
9 18, 2005 spill;

10 4. Award the United States of America and the State of California their costs and
11 disbursements in this action; and

12 5. Grant such other relief as this Court deems appropriate.

13
14 Respectfully submitted,

15
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Appendix A: EBMUD Violations

Date	Facility of EBMUD System	Pollutant/Wastewater	Measurement	Limit	Type of Violation
12/18/05	Collection System	Sanitary sewage	10,600,000 gal.	--	SSO
12/21/05	Pt. Isabel WWF	Chlorine residual	12.7 mg/l	0	Effluent limit
12/31/05	Pt. Isabel WWF	Chlorine residual	12.6 mg/l	0	Effluent limit
12/31/05	San Antonio Creek WWF	Chlorine residual	1.2 mg/l	0	Effluent limit
1/1/06	Oakport WWF	Chlorine residual	6-10 mg/l	0	Effluent limit
2/27-2/28/06	Oakport WWF	Silver	42 µg/l	26 µg/l	Effluent limit
3/17/06	Oakport WWF	Silver	78 µg/l	26 µg/l	Effluent limit
11/25/06	Main WWTP	TSS	91.7 mg/l	45 mg/l	Effluent limit (weekly ave.)
11/30/06	Main WWTP	TSS	42.4 mg/l	30 mg/l	Effluent limit (monthly ave.)
9/15/07	Main WWTP	TSS	59.9 mg/l	45 mg/l	Effluent limit (weekly ave.)
9/22/07	Main WWTP	TSS	54.3 mg/l	45 mg/l	Effluent limit (weekly ave.)
9/30/07	Main WWTP	TSS	37.3 mg/l	30 mg/l	Effluent limit (monthly ave.)
10/11/07	Collection System	Sanitary sewage	6,300 gal.	--	SSO
1/4/08	Collection System	Sanitary sewage	6,500 gal.	--	SSO
10/15/08	Collection System	Sanitary Sewage	< 1000 gal.	---	SSO

WWF = Wet Weather Facility

WWTP = Wastewater Treatment Plant

TSS = Total Suspended Solids

SSO = Sanitary Sewer Overflow